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In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA AND
ROSCOE L. EGGER, JR., COMMISSIONER OF
INTERNAL REVENUE, PETITIONERS

v.

WILLAMETTE INDUSTRIES, INC.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

REX E. LEE

Solicitor General

GLENN L. ARCHER, JR.

Assistant Attorney General

STUART A. SMITH

Assistant to the Solicitor General

RICHARD W. PERKINS

STEPHEN GRAY

Attorneys

Department of Justice

Washington, D.C. 20530

(202) 633-2217

QUESTION PRESENTED

Whether disclosure of tax return information that does not explicitly identify a particular taxpayer, but which has not been amalgamated into statistical compilations, so that it remains in a form which creates a risk of association with a particular taxpayer, is barred by 26 U.S.C. 6103, and therefore "specifically exempted from disclosure by statute" within the meaning of Exemption 3 of the Freedom of Information Act, 5 U.S.C. 552(b) (3).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States and Roscoe L. Egger, Jr., Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the district court (App. B, *infra*, 11a-25a) is reported at 530 F. Supp. 904. The judgment of the district court (App. C, *infra*, 26a-27a) is unreported. The opinion of the court of appeals (App. A, *infra*, 1a-10a) is reported at 689 F.2d 865.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1982 (App. A, *infra*, 1a). By order dated December 27, 1982, Justice Rehnquist extended the time within which the government may file a petition for a writ of certiorari to and including February 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The pertinent provisions of the Freedom of Information Act (5 U.S.C. (& Supp. V) 552) and Section 6103 of the Internal Revenue Code (26 U.S.C.)¹ are as follows:

5 U.S.C. 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

* * * * *

(b) This section does not apply to matters that are—

(3) specifically exempted from disclosure by statute * * * provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

¹ For the convenience of the Court, we have reproduced the entire text of Section 6103 of the Internal Revenue Code of 1954 at App. D, *infra*, 28a-77a.

26 U.S.C. (& Supp. V) 6103.

SECTION 6103 [as amended by Section 1202 (a) (1), Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1667 and by Section 701, Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 340]. Confidentiality and disclosure of returns and return information.

(a) *General Rule.*—Returns and return information shall be confidential, and except as authorized by this title—

(1) no officer or employee of the United States,

* * * * *

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

(b) *Definitions.*—For purposes of this section—

* * * * *

(2) *Return information.*—The term "return information" means—

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, over-assessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the

determination of the existence, or possible existence, or liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and

* * * * *

but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. * * *

STATEMENT

Respondent is a timber producer and manufacturer of wood and forest products (App. A, *infra*, 2a; App. B, *infra*, 11a). It brought this suit under the Freedom of Information Act, 5 U.S.C. (& Supp. V) 552, in the United States District Court for the District of Oregon, to compel disclosure of various types of documents held by the Internal Revenue Service, dealing with the Service's treatment of the timber industry. The litigation ultimately focused on two types of documents from several different geographic areas for the years 1973-1976 (App. A, *infra*, 3a).² The first type of document sought by respondent was engineering and valuation reports (EVRs) and related background material, which are prepared by Internal Revenue Service foresters during a disputed audit of a particular taxpayer and reflect the Service's valuation of the timber owned by that specific taxpayer. The EVRs generally contain the names and addresses of the audited taxpayers,

² Respondent also sought IRS administrative manuals and instructions regarding timber valuation. The Service released the administrative manuals and instructions (App. A, *infra*, 3a; App. B, *infra*, 12a n.1).

the volume of each species of timber involved in each case, land value allocations, the fair market value determined by the Internal Revenue Service for each species, the valuation dates, and the specific area in which the subject timber was located (App. A, *infra*, 2a; App. B, *infra*, 12a, 22a).

The second type of document was private timber sales data, which are also compiled during an audit of a taxpayer. Unlike the EVRs, which list valuations of timber owned by the audited taxpayer, the private timber sales data are records of comparable sales by other taxpayers and are used by IRS auditors as references to determine the market value of the audited taxpayer's timber. This information is derived from data supplied by various sources including Forms T filed with the Internal Revenue Service by taxpayers who have sold timber during the taxable years. These Forms T contain: the identity of the parties to a particular timber transaction; the character and quality of the timber as determined by species, age, size, condition, etc.; the quantity of timber per acre, the total quantity involved, and the location of the timber in question with reference to other timber; the accessibility of the timber, *i.e.*, its distance from a common carrier, and the topography and other features of the ground upon which the timber stands and over which it must be transported in the process of exploitation; the probable cost of exploitation and the state of industrial development of the locality; and the freight rates by common carrier to important markets. The Internal Revenue Service foresters refer to this information when examining comparable purchases and sales of timber by those taxpayers whose transactions are under audit. As a result, many audit files contain private sales data about sales of timber by unrelated third parties, derived from the Forms T filed by such parties (App.

A, *infra*, 2a; App. B, *infra*, 12a, 22a-23a; App. C, *infra*, 26a-27a).

The district court granted summary judgment to respondent. It held that respondent was entitled to disclosure of both the EVRs and private sales data (App. B, *infra*, 12a-25a). The court conditioned disclosure upon deletion of details apparently identifying a particular taxpayer, *i.e.*, the deletion from the EVRs of the names of the taxpayers and the total volume of each tract, and the deletion from the private sales data of the names of the taxpayers, the purchasers of the timber, and the total volume of the timber (*id.* at 26a-27a). In so ruling, the court rejected the government's argument that the material sought by respondent was "return information" barred from disclosure under 26 U.S.C. 6103, and therefore "specifically exempted from disclosure by statute" under Exemption 3 of the Freedom of Information Act. As the court viewed the matter, its mandated deletions from the material brought the documents outside the Section 6103 definition of "return information" as "data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer" (App. A, *infra*, 15a-22a).

The court of appeals affirmed (App. A, *infra*, 1a-10a). It agreed that Section 6103 of the 1954 Code is an Exemption 3 statute within the meaning of the Freedom of Information Act. It held, however, that the EVRs and private sales data, with the deletions ordered by the district court, were not "return information." Once such deletions are made, the court ruled, the documents become "data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer" within the meaning of Section 6103(b)(2)(B). In

so holding, the court adhered to its prior decision in *Long v. Internal Revenue Service*, 596 F.2d 362 (1979), cert. denied, 446 U.S. 917 (1980).

REASONS FOR GRANTING THE PETITION

In holding that tax return information concerning particular taxpayers, with explicit references to those taxpayers deleted, is not barred from disclosure by 26 U.S.C. (& Supp. V) 6103, even though such information remains in a form that nevertheless could identify a particular taxpayer, the decision below squarely conflicts with *King v. Internal Revenue Service*, 688 F.2d 488 (7th Cir. 1982). There, shortly before the decision in the instant case, the Seventh Circuit ruled that virtually identical material in a different business context is barred from disclosure under 26 U.S.C. (& Supp. V) 6103, unless its form is changed by amalgamating it with other return information to form statistical compilations or tabulations, which cannot be associated with or otherwise directly or indirectly identify a particular taxpayer.

Although the *King* decision was called to the attention of the court below, it declined to address it. Instead, the court simply adhered to its earlier construction of Section 6103(b) (2) (B) in *Long v. Internal Revenue Service*, 596 F.2d 362 (1979), cert. denied, 446 U.S. 917 (1980), and that adopted in *Neufeld v. Internal Revenue Service*, 646 F.2d 661 (D.C. Cir. 1981),³ both of which the *King* court explicitly rejected (688 F.2d at 490 n.1). Thus, the courts of appeals are in disagreement on an important question of tax administration involving the scope of the protection enacted by Congress in Section 6103 to ensure the privacy and confidentiality of tax return information entrusted to the Internal Revenue

³ Accord: *Moody v. Internal Revenue Service*, 654 F.2d 795, 797-798 (D.C. Cir. 1981).

Service. This Court should grant certiorari and establish a uniform national rule with respect to whether such tax return information is barred from disclosure by 26 U.S.C. (& Supp. V) 6103, and therefore "specifically exempted from disclosure by statute" within the meaning of Exemption 3 of the Freedom of Information Act.

1. Millions of individuals and business entities subject to federal tax are required to provide highly confidential information to the Internal Revenue Service to enable it to discharge its statutory obligation to assess and collect taxes. This information, and the documents in turn created and collected by IRS personnel, are crucial to the effective administration of the revenue laws. In order to promote the continued submission by taxpayers of such information with a minimum of governmental compulsion, Congress added Section 6103 to the Internal Revenue Code of 1954 to guarantee the confidentiality of tax return information. Like the statutory prohibitions against the disclosure of raw census data considered by the Court in *Baldrige v. Shapiro*, 455 U.S. 345 (1982), Section 6103 of the Code bars the disclosure of such material by the Internal Revenue Service, except in carefully defined and limited circumstances. Violations of this public trust are subject to severe sanctions. Section 7213 of the 1954 Code (App. D, *infra*, 73a-75a) provides that unauthorized disclosure of return information is a felony punishable by a five-year prison term and a \$5,000 fine, and, if the offender is a federal employee, he is subject to mandatory dismissal.⁴

⁴ Civil damages are also available. See Section 7431 of the 1954 Code (App. D, *infra*, 76a-77a), added by Section 357 of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 645, repealing Section 7217 of the Code.

Section 6103(b)(2)(A) (page 3, *supra*) defines the term "return information" in the broadest possible language. It sets forth an exhaustive list of items, including the taxpayer's identity, nature, source or amount of income, payments, credits deductions, etc., required to be reported. The plain language of the provision supports the construction that the statute prohibits the disclosure of much more than a "taxpayer's identity" because that is the first of the many enumerated items comprising the definition of "return information." As the Seventh Circuit observed in *King v. Internal Revenue Service*, *supra*, 688 F.2d at 491, "[i]f Congress had intended only taxpayer-identifying information to be exempt, it could have achieved that result with a much simpler statute specifying merely that all non-identifying information is disclosable. Congress chose not to go that route." Accord: *Cliff v. Internal Revenue Service*, 496 F. Supp. 568, 574 (S.D. N.Y. 1980). After the detailed list of items comprising "return information," the statute provides an exception for "data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer."

Just as the initial list of items is broadly cast to encompass in the definition of "return information" the gamut of items set forth on a tax return and the ensuing determinations that may be made by the Internal Revenue Service, the formulation of the statutory exception—known as the Haskell amendment—likewise implements Congress' intent to guarantee the confidentiality of such material. Hence, the term "return information" does not include "data in a form" which "cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer."

Thus, the plain language of the statute confirms that the mere deletion of a taxpayer's name or other explicit identifying details from a document that would otherwise constitute "return information" does not expose the document to disclosure. The remaining information may nevertheless be "associated with, or otherwise identify, directly or indirectly a particular taxpayer." Indeed, the use of the statutory phrase "data in a form" in conjunction with the language protecting against direct or indirect association or identification with a particular taxpayer, suggests that Congress meant to exclude from the disclosure prohibition only information that is changed in form, *i.e.*, likely rendered anonymous by amalgamating it with return information concerning other taxpayers to form "data," *i.e.*, statistical compilations. Simply put, "the Haskell amendment provided only for the disclosure of statistical tabulations which are not associated with or do not identify particular taxpayers." *King v. Internal Revenue Service*, *supra*, 688 F.2d at 493.

2. What is more, the structure of Section 6103 as a whole reinforces the foregoing reading of the statute and the Haskell amendment. Section 6103(f) (1) of the 1954 Code, dealing with disclosure to committees of Congress, supports our submission that "return information" is a broader concept than taxpayer-identifying information.

Section 6103(f) (1) provides:

(f) *Disclosure to Committees of Congress—*

(1) *Committee on Ways and Means, Committee on Finance, and Joint Committee on Taxation—*Upon written requests from the chairman of the Committee on Ways and Means of the House of Representatives, the chairman of the Committee on Finance of the Senate, or the chairman of

the Joint Committee on Taxation, the Secretary shall furnish such committee with any return or return information specified in such request, except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

As the foregoing statutory language makes clear, there are two types of return information that can be made available to Congress. First, information that identifies a particular taxpayer can be furnished to the committee only when sitting in closed executive session. But even when the return information contains no such identification, Congress nevertheless believed it required particular statutory authorization to obtain such documents. If, however, the decision below correctly concluded that tax return information (as opposed to amalgamated statistical compilations) with the taxpayer's name or other identifying details deleted can be publicly disclosed, the separate statutory authorization prescribed by Section 6103(f)(1) would be largely superfluous.

Long v. Internal Revenue Service, *supra*, the prior decision construing the Haskell amendment to which the court below adhered, erroneously brushed aside the relevance of Section 6103(f)(1). Although the court in *Long* acknowledged that our interpretation of the Haskell amendment was "quite reasonable" (596 F.2d at 368), it nevertheless concluded that "Given the choice between adopting the explicit language of one section and an inconsistent implication of another, we chose the explicit language [of Section 6103(b)]" (*ibid.*). But *Long* rests upon the erroneous premise that the language of the Haskell

amendment authorizes disclosure of "return information" in the absence of explicit reference to a particular taxpayer. Such an interpretation, as we have pointed out (pages 9-10, *supra*), is inconsistent with the plain language of the statute. A harmonious construction of the statute as a whole demonstrates that Congress intended to bar public disclosure of all "return information" that could possibly be associated with, or otherwise identify, *directly or indirectly*, a particular taxpayer. Hence, the Seventh Circuit in *King* correctly "dismiss[ed] the *Long* court's unpersuasive interpretation of the effect of section 6103 (f) (1)" (688 F.2d at 492).

3. Under the decision below, a third party, such as respondent, could carefully narrow its request for general information as to taxpayers and obtain return information that could be "associated with, or otherwise identify, directly or indirectly" particular taxpayers. Indeed, the facts of this case graphically illustrate the potential invasion of taxpayer's privacy authorized by the court below. The forestry industry is highly specialized, and respondent is a major member of that industry. Valuation of lumber, like any other commodity, requires examination of comparable data. Neither a court nor the Internal Revenue Service is in a position to appraise respondent's ability to correlate the comparable sales and valuation data sought by respondent with respect to its specific competitors despite the deletion of all apparent taxpayer-identifying information. Contrary to the assumption of the court below in *Long* that "there is no threat to taxpayer privacy" (596 F.2d at 368; footnote omitted) upon the disclosure of such information, the same potential invasion of privacy exists with respect to all disclosures of "return information" with the taxpayer's name or other identifying details deleted.

As, the Seventh Circuit in *King* correctly stated (688 F.2d at 491-492):⁵

Even if the taxpayer's name is deleted * * *, the industry discussed in the documents here is sufficiently specialized that the plaintiff might well be able to deduce * * * which taxpayer's return has been disclosed. Allowing the determination by the district court on an ad hoc basis of whether an FOIA requester has sufficient data to make such an association would substantially undercut the protective purpose of section 6103(b)(2). The district court, like the I.R.S., cannot be aware of how much information the requester already possesses to facilitate the association.

4. Finally, to the extent that there is legislative history with respect to the Haskell amendment, it shows that the statute permits only the disclosure of statistical tabulations, which cannot be associated with or do not identify particular taxpayers. The amendment was introduced during the Senate floor debate on the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520, and adopted without debate or discussion beyond Senator Haskell's remarks. The amendment was not discussed either in the House or Senate reports on the Tax Reform Act of 1976 (see H.R. Rep. No. 94-658, 94th Cong., 1st Sess. (1975); H.R. Rep. No. 94-1380, 94th Cong., 2d Sess. (1976); and S. Rep. No. 94-938, 94th Cong., 2d Sess. (1976)) nor in either conference committee report (see H.R. Conf. Rep. No. 94-1515, 94th Cong., 2d Sess. (1976); S. Conf. Rep. No. 94-1236, 94th Cong., 2d Sess. (1976)). In introducing the provision, Senator Haskell explained (122 Cong. Rec. 24012 (1976)):

⁵ The documents requested in *King* concerned likewise highly technical tax information directly concerning taxpayers in the trucking industry. See 688 F.2d at 489-490.

[t]he purpose of this amendment is to insure that statistical studies and other compilations of data now prepared by the Internal Revenue Service and disclosed by it to outside parties will continue to be subject to disclosure to the extent allowed under present law. Thus the Internal Revenue Service can continue to release for research purposes statistical studies and compilations of data, such as the tax model, which do not identify individual taxpayers.

The definition of "return information" was intended to neither enhance nor diminish access now obtainable under the Freedom of Information Act to statistical studies and compilations of data by the Internal Revenue Service. Thus, the addition by the Internal Revenue Service of easily deletable identifying information to the type of statistical study or compilation of data which, under its current practice, has been subject to disclosure, will not prevent disclosure of such study or compilation under the newly amended section 6103. In such an instance, the identifying information would be deleted and disclosure of the statistical study or compilation of data be made.⁶

Hence, the concluding clause added by Senator Haskell to Section 6103(b)(2) does not alter the fundamental statutory definition of "return information." That clause necessarily contemplates that return information, to be disclosed, must both: (1) be in a different form, *i.e.*, amalgamated with other data; and (2) not directly or indirectly identify the taxpayer. The purpose of the amendment is to permit the Internal Revenue Service to continue its collection

⁶ In response to the proposed amendment, Senator Long stated: "Mr. President, I will be happy to take this amendment to conference. It might not be entirely necessary, but it might serve a good purpose." 122 Cong. Rec. 24012 (1976).

and release of general statistics without running afoul of the prohibition against disclosure of "return information." The amendment does not, however, permit the release of any of the items comprising the statutory definition of "return information" in an unchanged form, such as that appearing in the EVRs and private sales data, which could possibly be associated with a particular taxpayer.

The fundamental error of the court below, first articulated in its prior *Long* decision,⁷ was to estab-

⁷ Our petition for certiorari (No. 79-1269, 1979 Term) in *Long* did not seek review of the Ninth Circuit's original construction of the Haskell amendment in that case. Rather, the question presented focused on whether the source documents of the IRS Taxpayer Compliance Measurement Program, used to develop audit selection criteria, were protected from disclosure under Exemption 2 or 7(E), two grounds that were not specifically raised in the lower courts. However, in our petition (at 13-14), we stated our disagreement with the court of appeals' interpretation of the Haskell amendment.

The disclosure of the documents ordered by the original *Long* decision was subsequently foreclosed by statute. See Section 701(a) of the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 340. This statute was enacted in response to *Long v. Bureau of Economic Analysis*, 646 F.2d 1310 (9th Cir. 1981), cert. granted, judgment vacated and remanded, 454 U.S. 934 (1981), vacated and remanded 671 F.2d 1229 (9th Cir. 1982). As the pertinent committee report (H.R. Conf. Rep. No. 97-215, 97th Cong., 1st Sess. 264 (1981)) explained:

Present law restricts the disclosure of tax returns and return information. However, information that cannot identify any particular taxpayer is not protected under the disclosure restrictions. Because of this, questions have been raised concerning whether the IRS can legally refuse to disclose information which is used to develop standards for auditing tax returns.

* * * However, it is intended that nothing in this provision [of the Economic Recovery Tax Act] be construed

lish a legal test that assumes that the disclosure of any return information is permitted as long as it does not explicitly identify a particular taxpayer. But the purpose of the amendment, as Senator Haskell explained, was to codify the Internal Revenue Service's existing practice of disclosing statistical compilations. Hence, any information which falls within the general definition of "return information" is barred from disclosure by Section 6103(b) unless it is amalgamated with other data in a statistical study, and cannot be associated either directly or indirectly, with a particular taxpayer. Especially in light of the acknowledged conflict in the circuits, the threat to the confidentiality of tax return information posed by the decision below calls for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE

Solicitor General

GLENN L. ARCHER, JR.

Assistant Attorney General

STUART A. SMITH

Assistant to the Solicitor General

RICHARD W. PERKINS

STEPHEN GRAY

Attorneys

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to limit disclosure of statistical data or other information
 * * * to the extent permitted under present law. Thus
 any information that is currently made available will
 continue to be available.